

STATE OF MICHIGAN
COURT OF APPEALS

HELENA LUSBY,

Plaintiff/Counter-Defendant-
Appellee,

v

RANDALL J. TELMAN, SCOTT R.
BRUNDAGE, DOUGLAS M. LEPPINK, CAROL
J. FEWLESS, and CENTRE FOR PLASTIC
SURGERY,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED

April 1, 2003

No. 237210

Kent Circuit Court

LC No. 00-004775-NZ

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order denying their motion for costs and attorney fees pursuant to MCR 2.405. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff worked for defendants as an aesthetician. Plaintiff's commissions were reduced and clients were removed from her schedule, and eventually her employment was terminated. A dispute arose as to the ownership of a "Power Peel" machine, a piece of equipment used in defendants' business, which was valued at \$18,500. Plaintiff asserted that she owned the machine and requested that defendants return it to her possession. Plaintiff's counsel advised defendants that plaintiff was prepared to file suit alleging conversion and seeking treble damages. Defendants denied that plaintiff owned the Power Peel machine and contended that they reduced plaintiff's commissions to recoup their investment in the machine. The parties were unable to resolve the matter.

Plaintiff filed suit alleging that defendants converted the machine by refusing to surrender it to her when she left her employment and seeking treble damages pursuant to MCL 600.2919a. Defendants answered the complaint and, simultaneously, filed an offer of judgment in the amount of \$500. Plaintiff did not respond to the offer of judgment and therefore was deemed to have rejected it. MCR 2.405(C). Subsequently, defendants filed an amended answer and a counterclaim alleging that during her employment plaintiff breached her fiduciary duty and duty of loyalty by engaging in an independent skin care business.

The parties filed competing motions for summary disposition pursuant to MCR 2.116(C)(10). They agreed to adjourn case evaluation pending the trial court's decision on the motions. The trial court granted both motions and dismissed the case in its entirety.

Defendants moved for costs and fees pursuant to MCR 2.405, arguing that because the adjusted verdict was more favorable to them than to plaintiff, plaintiff was required to pay their actual costs. MCR 2.405(D)(1). Defendants sought a total of \$19,002.92. The trial court denied the motion, concluding that defendants' early, low offer constituted a form of gamesmanship.

The purpose of MCR 2.405, the offer of judgment rule, is to encourage settlement and deter protracted litigation. *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995). If an offeree rejects an offer of judgment and the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay the offeror's actual costs incurred in maintaining the action. MCR 2.405(D)(1). Actual costs include the costs and fees taxable in a civil action and a reasonable attorney fee. MCR 2.405(A)(6). The trial court must determine actual costs but may, in the interest of justice, refuse to award an attorney fee. MCR 2.405(D)(3). The sanction should be routinely enforced. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 472; 624 NW2d 427 (2000). The circumstances justifying the denial of a motion for sanctions under MCR 2.405 must be unusual.

Such circumstances include the making of an insincere offer for the purpose of gamesmanship or to avoid case evaluation sanctions, the presentation of a novel legal issue, the litigation of a matter of public interest, the litigation of an issue which merits a decision by the trier of fact, or where the effect on third persons could be significant. *Luidens v 63rd District Court*, 219 Mich App 24, 33-37; 555 NW2d 709 (1996). The reasonableness of a refusal of an offer is not, in and of itself, sufficient to justify denial of a motion for sanctions. *Butzer v Camelot Hall Convalescent Centre, Inc (After Remand)*, 201 Mich App 275, 278; 505 NW2d 862 (1993). We review a trial court's decision to award or deny sanctions under MCR 2.405 for an abuse of discretion. *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996).

Defendants argue that the trial court abused its discretion by denying their motion for sanctions under MCR 2.405. We agree and reverse the trial court's order and remand this case for further proceedings consistent with this opinion. This case did not present any of the unusual circumstances that would justify the denial of a motion for sanctions. *Luidens, supra* at 33-37. Essentially, the trial court denied defendants' motion for sanctions on the grounds that their offer was made at the outset of the case and was sufficiently low when compared to the damages sought by plaintiff that defendants could not have expected that plaintiff would accept it. Defendants' offer was made simultaneously with the filing of their answer; therefore, the offer cannot be deemed unreasonably low as compared to any other benchmark such as case evaluation. Cf. *Stitt, supra* at 476.

Moreover, an offer made at the outset of a case serves the purpose of the offer of judgment rule, i.e., to encourage settlement and avoid protracted litigation. *Hamilton, supra*. Defendants made a low offer compared to the damages requested by plaintiff; however, as the trial court acknowledged, the offer was reasonable in light of the ultimate verdict. The reasonableness of a party's decision to reject an offer of judgment does not, without more, justify a denial of sanctions. *Butzer, supra*.

The trial court's articulated reasons did not constitute a sufficient basis for the denial of defendants' motion for sanctions; therefore, the trial court's decision constituted an abuse of discretion. On remand, the trial court shall determine the actual costs and the reasonable attorney fee to which defendants are entitled. MCR 2.405(D)(3); *Luidens, supra* at 30-31.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage